No. 16256.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUTH JOHNSON WILLIAMS and FRED COOK, JR.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS.

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I.

JURISDICTIONAL STATEMENT.

Appellants Ruth Johnson Williams and Fred Cook, Jr., along with Juanita Smith and Eddie Jewel Bryant were indicted by the Federal Grand Jury in Los Angeles, California, March 12, 1958 (Criminal Docket No. 26654). [Tr. pp. 12-17.] The indictment is in eight counts. Neither of the appellants is mentioned in the first four counts of the indictment. The first four counts charged Eddie Jewel Bryant and Juanita Smith with violations of U. S. C., Title 21, Section 174. Appellant Williams was named in Counts Five, Six, Seven and Eight of the indictment. Appellant Cook was named in Counts Five, Six and Eight of the indictment.

Count Five of the indictment charges (21 U. S. C., Sec. 174) appellant Ruth Johnson Williams, Eddie Jewel

Bryant and appellant Fred Cook, Jr., with having, on or about February 24, 1958, sold and facilitated the sale of 2 ounces, 399 grains of heroin, a narcotic drug, to Justin Burley. [Tr. p. 14.]

Count Six charges (21 U. S. C., Sec. 174) appellant Ruth Johnson Williams, Eddie Jewel Bryant and appellant Fred Cook, Jr., with having on February 24, 1958 received, concealed and facilitated the transportation of 2 ounces, 399 grains of heroin. [Tr. pp. 14-15.]

Count Seven charges (21 U. S. C., Sec. 174) appellant Ruth Johnson Williams with having on February 24, 1958 received, concealed and facilitated the concealment of 3 ounces, 404 grains of heroin. [Tr. p. 15.]

Count Eight charges (18 U. S. C., Sec. 371) appellant Ruth Johnson Williams, one Juanita Smith and one Eddie Jewel Bryant, and appellant Fred Cook, Jr., with conspiring, beginning February 14, 1958, "to receive, conceal, sell and facilitate the transportation, concealment and sale of heroin." [Tr. pp. 15-17.] Four overt acts are alleged: (1) That on or about February 14, 1958, Eddie Jewel Bryant sold 403 grains of heroin to Justin Burley. The first overt act alleged is the same charge as that contained in Count One of the indictment in which only Eddie Jewel Bryant is mentioned; (2) That on February 17, 1958, Juanita Smith and Eddie Jewel Bryant sold and facilitated the sale of 303 grains of heroin to Justin Burley. This is the same charge as that contained in Counts Two and Three of the indictment in which appellants are not mentioned; (3) That on February 24, 1958, appellant Williams, Eddie Jewel Bryant and appellant Cook received, concealed and facilitated the transportation of 2 ounces, 399 grains, of heroin and did sell the same to Justin Burley. This is a repetition of the charges in Counts

Five and Six of the indictment; (4) That on February 24, 1958, appellant Williams received, concealed and facilitated the concealment of 3 ounces, 404 grains of heroin. This is the same charge as that contained in Count Seven of the indictment.

The four defendants were tried together. Eddie Jewel Byant was represented at the trial by Arthur Sherman; Juanita Smith, by Harry E. Weiss; and Ruth Johnson Williams and Fred Cook, Jr., by Wm. H. Neblett.

Eddie Jewel Bryant was convicted on Counts One, Two, Four, Five, Six and Eight of the indictment. [Tr. p. 80.] She did not appeal. Juanita Smith was acquitted. Appellant Williams was convicted on Counts Five, Six, Seven and Eight. [Tr. p. 81.] Appellant Cook was convicted on Counts Five, Six and Eight. [Tr. p. 82.]

Appellant Williams was sentenced to 10 years in prison and fined $5,000 on Counts Five, Six and Seven of the indictment, and 5 years in prison on Count Eight. The sentences on all Counts were made to run concurrently. The $5,000 fine of Counts Five, Six and Seven was ordered discharged by the payment of one $5,000. The judgment, sentencing appellant Williams, recites that the total time of her imprisonment is 10 years and the total fines $5,000. [Tr. p. 94.]

Appellant Cook was sentenced to 5 years each on Counts Five, Six and Eight of the indictment, the sentences to run concurrently. [Tr. p. 97.]

Ruth Johnson Williams and Fred Cook, Jr. appealed from the judgments against them. [Tr. pp. 103-104.] Their appeals are before this Court on one record. Both appellants were released on bail by the District Court pending their appeals. [Rep. Tr. p. 102.]

The acts charged in the indictment were all laid in Los Angeles, California, within the United States District Court for the Southern District of California, Central Division.

The substantive charges against appellant Williams made in Counts Five, Six and Seven and those made against appellant Cook in Counts Five and Six are all based upon the alleged happenings of February 24, 1958 and apparently all arise out of that one transaction. It was on February 24, 1958, that Ruth Williams' home was entered by federal and state narcotic officers without a valid search warrant and without a warrant of arrest and the evidence seized upon which the convictions of both appellants depend. It is upon this illegal search and seizure that Overt Acts 3 and 4 alleged in Count Eight, the conspiracy Count, are based. [Tr. p. 17.] Overt Acts 1 and 2 alleged in the conspiracy count [Tr. pp. 16-17] are but a translation into overt acts of a conspiracy of the substantive offenses charged of Counts One, Two, Three and Four, in none of which either appellant is mentioned. Counts One, Two, Three and Four charge Juanita Smith and Eddie Jewel Bryant with committing certain offenses in violation of Title 21, U. S. C., Section 174. Juanita Smith is not named in Counts Five, Six or Seven which contain the substantive charges against appellants. She is named as one of the conspirators in Count Eight and specifically charged with participation in Overt Act No. 2. [Tr. p. 17.] Juanita Smith was acquitted on all counts charged against her in the indictment. [Tr. p. 80.]

There is not a word of testimony in the record that appellant Ruth Williams ever knew or had any contact whatever, directly or indirectly, with Eddie Jewel Bryant, who was convicted on all counts upon which she was charged

in the indictment. [Tr. p. 80.] The conviction of both appellants thus rests solely upon the legality of the entry into Ruth Willaims' home without a warrant of arrest or a valid search warrant and the search and seizure of the evidence on her premises which was admitted at the trial, after two motions to suppress had been made prior to the trial and denied. The second motion to suppress was denied without prejudice. [Tr. p. 60.] The same evidence was admitted at the trial over repeated objections made by appellants Williams and Cook, and subsequent motions to strike the evidence were denied.

The trial Court, Judge Mathes, held that the search warrant under which Ruth Williams' home was entered and searched was void [Tr. pp. 36-37] and went on to hold in the same order that the search and seizure of the items in Ruth Williams' home and on her premises were done incident to a valid arrest without a warrant after the federal narcotic officers and state officers had entered her home without announcing their intention and purpose. (Sec. 3109, 18 U. S. C.)

The entry into Ruth Williams' home and the search and seizure of the evidence used to convict her and appellant Cook was clearly illegal. The first motion to suppress the evidence should have been granted. If not, surely the second one should have been granted. (*Miller v. United States* (June 23, 1958), 257 U. S. 301, 78 S. Ct. 1190; *Giordenello v. United States* (June 30, 1958), 357 U. S. 480, 78 S. Ct. 1245; *Jones v. United States* (June 30, 1958), 357 U. S. 493, 78 S. Ct. 1253.)

This Court's attention is invited to the fact that the motions of appellants Williams and Cook for acquittal and in the alternative for a new trial, made pursuant to Rule 29(b), Federal Rules of Criminal Procedure, filed

June 2, 1958 [Tr. pp. 86, 89], were denied by the trial court, Judge Harrison, June 13, 1958. [Tr. p. 98.] The denial of the motions for new trial thus occurred 10 days before the decision in the *Miller* case was handed down and 17 days before the decisions in *Giordenello* and the *Jones* cases were made. Thus the trial court did not have before it the *Miller, Giordenello,* and *Jones* cases at the time of the trial.

Counsel for appellants relied at the trial on Rules 3, 4, 5 and 41 of the Federal Rules of Criminal Procedure; *Johnson v. United States* (1948), 333 U. S. 10, 68 S. Ct. 367; *Trupiano v. United States* (1948), 334 U. S. 699, 68 S. Ct. 1229; *McDonald v. United States* (1948), 335 U. S. 451, 69 S. Ct. 191; *Kremen v. United States* (1957), 353 U. S. 346, 77 S. Ct. 828, and several other cases from this Court and from other Circuit Courts of Appeals which will be cited in argument.

The officers testified that they obtained some of the information upon which they entered appellant Williams' home from an informer. When it appeared that the informer participated in the offense, the court, Judge Mathes, compelled the officers to answer the questions of appellants' counsel, seeking to learn the identity of the informer. The officers responded to this direction of the court by naming the informer as "Jesse Thomas." [Rep. Tr. pp. 287-290.] The officers consistently denied they knew where "Jesse Thomas" was at the time of the trial or where he at any time had lived and testified that no effort had been made to find him; nor had he been subpoenaed by the Government as a witness. [Rep. Tr. pp. 506-507, 551, 556, 558.] As to the identity of the informer the officers would go no further than to say: "He is known to me as Jesse Thomas." [Rep. Tr. pp. 287-290.]

The testimony of the officers had the actual effect of refusing to reveal the identity of the informer within the meaning of the federal and state decisions on the subject. (*Roviaro v. United States* (1957), 353 U. S. 53, 77 S. Ct. 623; *People v. McShann* (1958), 50 Cal. 2d 802; *Priestly v. Superior Court* (1958), 50 Cal. 2d 812.)

The District Court had jurisdiction. (18 U. S. C., Sec. 3231.) The jurisdiction of this Court is invoked under Sections 1291 and 1294(1) of 28 U. S. C.

II.
PERTINENT STATUTES.

The indictment charges violations of Title 21, U. S. C., Section 174, and Title 18, U. S. C., Section 371, which statutes are quoted below:

Title 21, U. S. C., Section 174:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

"For provision relating to sentencing, probation, etc, see section 7237(d) of the Internal Revenue Code of 1954."

Title 18, U. S. C., Section 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined no more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximun punishment provided for such misdemeanor."

III.
STATEMENT OF THE CASE.

Appellant Ruth Johnson Williams is a widow, 60 years old. [Tr. p. 21.] Appellant Fred Cook, Jr., is Mrs. Williams' nephew. Cook, a veteran of World War II, is 38. [Tr. p. 47.]

On the morning of February 24, 1958, the United States Commissioner in Los Angeles issued a search warrant to search the premises at 5417½ South Wilton Place.

(Appx. p. 4.)[1] Armed with the search warrant, federal narcotic officers Malcolm P. Richards and William C. Gilkey accompanied by deputy sheriffs of Los Angeles County, Arthur Gillette, A. F. Landry and William R. Farrington, entered and searched the home and premises of Ruth Williams and seized as evidence the items set up in the inventory on the return of the search warrant. (Appx. p. 5.)

Among the items seized was $15 of marked currency, one $10 bill and one $5 bill. The money was seized from appellant Williams' purse. [Rep. Tr. pp. 280-281.] Seized in the rear of house from a trash can were four small brown envelopes containing a white powdery substance, which was afterwards found to be heroin. Appellant Cook was on the premises at the time. The premises were entered around 3:00 o'clock in the afternoon. The officers just opened the door and walked in without saying a word. (Sec. 3109, 18 U. S. C.; Sec. 7607, 26 U. S. C.) The officers made a thorough search of the upstairs living quarters, the downstairs rumpus room, the washroom and the yard. [Rep. Tr. pp. 304-308.] After the search was over, appellants Williams and Cook were taken to the federal narcotics office in the Federal Building and were held there for about 3 hours. They were then booked in the Los Angeles County Jail on suspicion of a federal narcotic violation. [Rep. Tr. pp. 710-718.]

Appellants Williams and Cook were arrested some time in the late forenoon of the next day, February 25, 1958.

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[1]The record here is quite voluminous so appellants have, for the convenience of the court, placed in the appendix to this brief the affidavits for search warrant (Appx. pp. 1-3), the search warrant and return thereon (Appx. pp. 4-5), and the statement or alleged confession of appellant Cook. (Appx. pp. 6-7.)

On the affidavit of federal narcotic agent Malcolm Richards, dated February 25, the United States Commissioner, issued a complaint against and a warrant for the arrest of appellants Williams and Cook. [Tr. pp. 1-2.] The warrant was executed by the United States Marshal, who arrested both appellants in the Federal Building in United States Commissioner Hocke's office, February 25. [Tr. p. 2.] On orders of the Commissioner both appellants were committed to the Los Angeles County jail. [Tr. pp. 3-4.] The appellants were indicted March 12. [Tr. pp. 12-17.]

Appellant Williams filed on April 14, 1958, some five weeks prior to the date of the trial, a motion to suppress the evidence seized on February 24, and inventoried in the return of the search warrant. [Tr. pp. 19-28.]

The case was in the courts of the following judges in the order stated—Judge Byrne, Judge Clarke, Judge Hall, Judge Mathes, and Judge Harrison.

Appellant Williams' motion to suppress evidence came on for hearing before Judge Mathes April 28, 1958. The motion was denied by a formal written order entered by the court. [Tr. pp. 36-38.] The court found that the search warrant issued for the search of appellant Williams' home was void on its face, under Rule 41, Federal Rules of Criminal Procedure, but held that Mrs. Williams was validly arrested by the officers who entered her home without a warrant for her arrest; and, that the search of her home and the seizure of the evidence was incident to a valid arrest. [Tr. pp. 36-37.]

Appellant Williams filed a second motion May 9, 1958, joined in by appellant Cook, to suppress the evidence which the court had held on April 28 [Tr. pp. 36-37] was seized from Ruth Williams' home as an incident to a valid ar-

rest. [Tr. pp. 41-49.] The motion was also directed at the suppression of the alleged written statement or confession of appellant Cook, taken from him in the federal narcotic office in the Federal Building in the evening of February 24, 1958, where he was detained some three hours for the purpose of questioning by federal narcotic officers, before he was booked. [Tr. pp. 41-43.] The motion came on for hearing May 19, before Judge Mathes. The court denied the motion without prejudice. [Tr. p. 60.]

On the next day, May 20, when the case was called for trial, Judge Mathes transferred the case to Judge Harrison. The trial was had before Judge Harrison with a jury. Deputy Sheriff Farrington was the first witness called by the Government. The greater part of Farrington's testimony was consumed with detailing his activities in connection with Eddie Jewel Bryant and Juanita Smith relating to the first Four Counts in the indictment, which are not material on this appeal. Toward the end of his direct testimony, Farrington testified that at approximately 2:45 to 3:00 p.m., he and deputy sheriffs Gillette and Landry, in company with federal narcotic agent Richards, entered Ruth Williams' home at 5417½ South Wilton Place, Los Angeles, and that deputy sheriff Gillette placed her under arrest. [Rep. Tr. pp. 234-235.] At the time, federal narcotic agent Richards was armed with a search warrant which had been issued that morning. Federal narcotic agent Richards spoke to appellant Williams and told her that he had a search warrant for the search of her place and a complete search was made of the house and the yard. [Rep. Tr. p. 235; Appx. pp. 4-5.] Farrington said that "in the upstairs portion, in the living room, Sgt. Landry removed from her purse a large

parcel of money and spread it on the table in the living room. At that time, "I shined the fluorescent light on these moneys and as I recall, two bills fluoresced." [Rep. Tr. p. 235.] The bills referred to were a $10 and a $5 bill inventoried in the search warrant. (Appx. p. 5.) At this time, counsel for defendant Ruth Williams objected as follows:

> "Mr. Neblett: If your Honor please, on behalf of the defendant Ruth Williams we object to this testimony on the ground that it was an illegal search and seizure and in violation of the defendant, Ruth Williams,' constitutional rights under the 4th Amendment. I would like to present that matter to your Honor at this time.
>
> The Court: *I think I told you that has been heard before Judge Mathes and he has made a ruling, and, of course, I will not admit any evidence relative to a search as far as a search warrant is concerned, under his ruling, but any search incident to an arrest I will admit.*[2]
>
> Mr. Neblett: If your Honor please, I am well advised as to the Court's statement yesterday in chambers, but this morning I checked with Mr. Jones, the Clerk for Judge Mathes, and the only Order issued by Judge Mathes on Monday at the time the Court is now talking about was a motion to suppress evidence, *which was denied without prejudice. That would indicate that we would have a right to renew it now and I would say that I feel confident that if we do not renew it at this time we may waive it. I don't feel we should waive it.*

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[2]All emphasis ours unless otherwise specified.

The Court: I think it is proper for you to protect your record *but inasmuch as it was heard by Judge Mathes, I am not going to rehear it.*

Mr. Neblett: Well, then, if your Honor please, may I put my objection in a little more technical form, I should say.

The Court: Yes.

Mr. Neblett: The objection and the motion on behalf of defendant Williams are that *we move to exclude all evidence turned up by the search of the defendant's home, Ruth Williams' home, on February 24, 1958, on the ground that the search was made without a warrant, without a search warrant, and on the ground that the arrest or the alleged arrest was made without a warrant of arrest and that the search without a warrant was made in violation of Rule 41 of the Federal Rules of Criminal Procedure, in that the arrest without a warrant was made in violation of Rules 3, 4 and 5 of the Federal Rules of Criminal Procedure, and that the search and the evidence turned up was all illegal evidence and should be excluded on the Rule of the Mallory case and the Cahan case.* Would your Honor like me to get the citations for those cases?" [Rep. Tr. pp. 234-238.]

The Court: I am familiar with them, I think.

Mr. Sheridan: Your Honor, if I may just for the purpose of the record—

The Court: I want to ask the witness a question. *You went out and placed the defendant Williams under arrest. Did you have a warrant at that time?*

The Witness: *I did not, sir.*

The Court: Had a warrant been issued?

The Witness: To my knowledge I do not know.

Mr. Neblett: If your Honor please—

The Court: *Under what authority did you go out there and place her under arrest?*

The Witness: I had reason to believe due to the date of the prior occasion of observing the female defendant, Eddie Jewel Bryant, enter this house prior to a narcotic transaction—enter the house, leave that house, joined Deputy Burley and immediately delivered to him approximately one ounce of heroin on one occasion, and on another occasion Detective Burley advised me that he had gone to the area of 5417½ Wilton Place.

I had information from a confidential informant, from Jesse Thomas, to the effect that Ruth Williams, who lived at 5417½ Wilton Place, was engaged in the illegal sale of narcotics.

I, on the 24th, observed the same 1954 Chevrolet driven by Fred Cook—1957—excuse me, a 1957 Chevrolet driven by Fred Cook, which the license number had been previously run and it had been observed in the vicinity of 5417½ on occasions when we maintained our surveillance of that neighborhood.

Mr. Neblett: If your Honor please, I hate to interrupt the witness, but this is in front of a jury and a lot of this is hearsay and we move that it be stricken.

The Court: *Well, how did you gain entrance to this place where Mrs. Williams lived?*

The Witness: *Walked in the door.*

The Court: *Was the door locked?*

The Witness: *No, sir.*

The Court: *It was not?*

The Witness: *Just walked in and placed her under arrest. Deputy Gillette knocked on the door several times. There was no answer. We tried the door. It opened and we walked in.*

The Court: Well, counsel this defendant was charged with a felony and the officer had a right to place her under arrest.

Mr. Neblett: Not without a warrant when the circumstances are such that a warrant is easily obtainable. *And besides he didn't enter the house with the idea of arresting her. The witness said awhile ago that he walked—that he went in with a search warrant to search the house.*

The Court: *Was a search warrant your authority for entering the place?*

The Witness: *No, sir, it was not. I entered 5417½ Wilton Place for the express purpose of arresting the defendant Williams."* [Rep. Tr. p. 235, line 12, to p. 239, line 13.]

At this point the Court adjourned for lunch. At the beginning of the afternoon session, these proceedings were had:

"The Court: Let the record show that these proceedings are in the absence of the jury.

Gentlemen, relative to the motion to suppress made before lunch *I am prepared to rule upon after talking with Judge Mathes.*

I want you to protect your record, of course, *but I am going to hold that this matter has been heard before Judge Mathes and passed upon by him and for the sake of the record I have a transcript of the hearing and I am willing that that be made a part of the record in this case so you will be fully protected as far as your record is concerned.*

I feel that the ruling by another judge of this court may not be completely binding upon me but I am not going to disturb it. * * *

The Court: *Judge Mathes had held it was a search in pursuance of a valid arrest. He held that the search warrant itself was invalid but that it was a valid arrest and a search was made in pursuance of it.*

I am simply going, in effect, to adopt his ruling and the record that was made before him can become a part of this record.

Mr. Neblett: If your Honor please, may I now state the objection and cite two cases. I won't argue them—if I may.

The Court: Yes.

Mr. Neblett: The defendant Ruth Johnson Williams objects to the admission of any evidence turned up at the search of her home at 5417½ Wilton Place, Los Angeles, California, on February 24, 1958, made by Deputy Sheriffs of Los Angeles County and made by Federal narcotic officers.

I move to exclude all such evidence on the ground that the search was made pursuant to an illegal and void search warrant and that the alleged search came after—the alleged search claim of the Government to have been made incident to a lawful arrest was made without a search warrant and was an unreasonable search and seizure prohibited by the Fourth and Fourteenth Amendments to the Constitution of the United States and in violation of Rules 3, 4 and 41 of the Federal Rules of Criminal Procedure.

Now, if your Honor please, I desire just to cite two cases in support of my motion.

I cite the case of Baumboy v. United States, from the Circuit Court of Appeals, Ninth Circuit, decided in 1928, 24 F. 2d at page 512, and the case of *Work v. United States,* decided by the Court of Appeals for the District of Columbia, 1957, 243 F. 2d at page 660.

And with that objection, your Honor, I submit the objection and the motion.

The Court: *I am going to admit the evidence as being a valid search as a result of a valid arrest made at that time in accordance with the rulings of Judge Mathes heretofore made after, I think counsel told me, five hours of testimony and argument.*

Mr. Neblett: If your Honor please, may I also ask the court to consider as a part of the record, in addition to the transcript which the court has before it now, the motion and affidavits on the first motion to suppress and the motion and affidavits on the second motion to suppress.

The Court: I presume that will be a part of the record. I haven't any objection to you making any part of anything that has transpired before Judge Mathes a part of the record in this case.

As a matter of fact I will direct it be written into the transcript if you want it.

Mr. Neblett: If your Honor please, I suppose that the denial of this motion does not preclude us from raising it again on a motion to acquit or something of that sort.

The Court: As I have told you before I want you to do anything you feel is proper in the protection of your clients' rights.

As to the extent that I will listen to argument on the rulings that Judge Mathes made I will have to cross that bridge when I come to it.

Mr. Neblett: *Very well, your Honor. I would like to reserve, if possible, a motion to strike this testimony on other grounds after it is in.*

The Court: I am perfectly willing that *you reserve your right to make a motion to strike any evidence in this case.*

> Mr. Neblett: I would like to do so in this case.
>
> The Court: In connection with the rulings by Judge Mathes at a hearing before him some time ago, I am going to direct the court reporter to copy into the record the proceedings had before him at that time." [Rep. Tr. p. 243, line 7, to p. 246, line 25.]

Pursuant to the Court's direction, there was included in the Reporter's Transcript the proceedings had before Judge Mathes on April 28, 1958, and they appear here in the Reporter's Transcript from pages 248 to 268, inclusive.

The substance of testimony of the officers on direct examination which was admitted over the objections of the appellants, detailed in the quotations above from pages 235 to 239, and pages 243 to 246 of the Reporter's Transcript follows:

In the afternoon of February 24, 1958, at approximately 3:00 o'clock in the afternoon, federal narcotic officer Malcolm Richards and William Gilkey accompanied by deputy sheriffs of Los Angeles County, Gillette, Landry and Farrington entered the gate opening into the small yard of Ruth Williams' home and went up the staircase on the outside wall of her apartment, to the entrance to her living quarters. Gillette said that he was in the lead. He reached the door at the top of the stairs and after knocking and receiving no response, he tried the door and found it unlocked. No one of the officers called to find if anyone was in the house, or made any remark whatever. [Rep. Tr. pp. 269-273.]

The officers opened the door, walked into the front room and then into the hallway and into one of the bedrooms. Appellant Williams was standing in the doorway of this

bedroom, next to a cedar chest. [Rep. Tr. pp. 276-277.] At or about this time, Gillette said that he placed appellant Williams under arrest for violation of the federal narcotic's laws. It was then that federal narcotic officer Richards made the statement to her that he had a search warrant to search the premises. [Rep. Tr. pp. 280-281.] The house was thoroughly searched by the officers but no narcotics were found in the house. [Rep. Tr. p. 283.] Upon entry into the house, the officers took Ruth Williams' handbag and had her pour its contents onto the table of the living room. [Rep. Tr. pp. 280-281.] A fluorescent lamp was put on the money obtained from Ruth Williams' handbag, and commingled with this money was $15 in marked currency, a $10 bill and a $5 bill. (Appx. p. 5.)

The living quarters in the upstairs part of the house, consisting of a kitchen, living room, bathroom, a small dining room and two bedrooms, together with downstairs rumpus room and wash room, were thoroughly gone over, about two hours being consumed in making the search. [Rep. Tr. pp. 278-279.] None of the officers had a warrant for the arrest of Ruth Williams or of Fred Cook, Jr. Cook was picked up by the officers in the downstairs rumpus room. [Rep. Tr. p. 283.]

Federal narcotic officer Malcolm Richards had a search warrant and he made his return thereon, a copy of which, and the inventory, he left on the premises when the officers took appellants to the federal narcotic office in the Federal Building downtown. This was the search warrant (Appx. pp. 4-5) which Judge Mathes had held void under Rule 41, Federal Rules of Criminal Procedure. [Tr. p. 36, line 24.]

Officer Richards' testimony as to the method of entry was substantially the same as that of Gillette. He ad-

mitted that he had a search warrant with him at the time. Richards told Williams when he entered the house that he had a search warrant for her home and showed the search warrant to her. [Rep. Tr. p. 304.] Richards showed her his identification, his pocket badge and the search warrant. He searched thoroughly every room in the house. [Rep. Tr. p. 306.] Richards said that he gave appellant Williams a copy of the search warrant and she read it. He identified the copy as the same copy of the search warrant which was marked as Defendant's Exhibit C at the hearing before Judge Mathes. [Rep. Tr. p. 307; Appx. pp. 4-5.] Richards said that he later took the copy of the search warrant from Mrs. Williams and put down on it all the articles that were seized during the search. These articles are entered on the return of the search warrant. [Rep. Tr. pp. 308-309; Appx. p. 5.]

The heroin mentioned in the return of the search warrant was found in the back in a garbage can. Richards said that although he made a thorough search of the house, both the living quarters upstairs and the rumpus room and other parts of the house downstairs, he found no narcotics in the house. There were five or six garbage trash cans in the area at the southwest corner of the building. There are four units in the flat building which front on Wilton Place. Those units also have an entrance through the gate off the alley which leads to Mrs. Williams' living quarters in the rear. Four flat units and appellant Williams' old garage apartment are all on one lot, the whole being owned by appellant Williams. The five or six garbage or trash cans, in one of which the heroin was found,

were commonly used by all of the tenants of the place, including the appellant Williams. Richards was not present when the heroin was found. He was making a search of the living quarters. Federal narcotic officer Gilkey had charge of the search of the yard and the premises adjacent to appellant Williams' apartment.

While he was on the stand, Richards identified his signature on the two affidavits he made for the search warrant. Richards said he was present when Justin Burley signed the other affidavit for the search warrant. [Rep. Tr. pp. 301-313; Appx. pp. 1-3.]

The illegality of the entry into appellant Williams' home and the search and seizure of the evidence contained in the inventory on the return of the search warrant (Appx. p. 5) was raised on the first motion of appellant Williams to suppress the evidence [Tr. p. 19] and in the second joint motion of appellants Williams and Cook to suppress the evidence. [Tr. p. 41.] The subject was raised before the trial court at every stage of the proceedings: (1) Appellants' objection to the testimony of the officers, made before Judge Harrison, *ante;* (2) Appellants' objection to the admission in evidence of Government's Exhibits 7-A, 7-B, 8, 8-A, 8-B, 8-C, 8-D and 9 [Rep. Tr. pp. 382-384], which exhibits designate all of the articles included in the inventory of the search warrant (Appx. p. 5); (3) Appellants' motion to strike the testimony of the officers relating to the search and seizure, and to strike Exhibits 7-A, 8, 8-A, 8-B, 8-C, 8-D and 9 [Rep. Tr. pp. 592-593]; (4) Appellants' motion to acquit Williams and Cook, made at the

conclusion of the Government's case [Rep. Tr. p. 570]; (5) The admission in evidence of the alleged confession of appellant Cook [Govt. Ex. 16; Appx. pp. 6-7] over the objection of the appellants [Rep. Tr. pp. 715-731]; (6) The motion for acquittal and motion in the alternative for new trial of appellant Williams and the motion for acquittal and motion in the alternative for new trial of appellant Cook. [Tr. pp. 83-86; Rep. Tr. pp. 87-89.]

Appellants contend that the search of Ruth Williams' home by federal narcotic officers without a warrant of search or arrest violated the constitutional rights guaranteed to appellant Williams by the Fourth Amendment to the Constitution, and that the evidence seized upon the search of her home was erroneously admitted in evidence at the trial as against her and her co-defendant, appellant Cook; that the court should have compelled the Government to reveal the true identity of the informer or the indictment should have been dismissed; that the court should have sustained the objections of the appellants to the receipt in evidence of the confession of appellant Cook; that the evidence was insufficient to justify the verdict finding the appellant Williams guilty on any one of the four counts in the indictment upon which she was convicted, Counts Five, Six, Seven or Eight; and that the evidence was insufficient to justify the verdict finding the appellant Cook guilty on any one of the three counts in the indictment upon which he was convicted, Counts Five, Six or Eight.

IV.
ASSIGNMENT OF ERRORS.

1. The trial court, Judge Mathes, erred in denying the motion of appellant Williams to suppress the evidence seized by federal narcotic officers and deputy sheriffs of Los Angeles County upon the entry of her home without a valid search warrant or a warrant of arrest. [Tr. pp. 36-38.]

2. The trial court, Judge Mathes, erred when he denied the joint motion of appellants Williams and Cook to suppress the evidence seized by federal narcotic and state officers upon the search of the home of Ruth Williams as an incident to an alleged valid arrest without a warrant for the arrest of Ruth Williams, and to suppress the evidence of an alleged confession [Govt. Ex. 16; Appx. pp. 6-7] of appellant Cook. [Tr. p. 60.]

3. The trial court, Judge Harrison, erred when he refused to reconsider the orders of Judge Mathes denying the motions to suppress which orders were made by Judge Mathes without prejudice [Tr. p. 60] and the refusal by Judge Harrison to sustain the objections of appellants to the evidence seized upon the search of Ruth Williams' home. To avoid repetition, appellants refer the court to Point III, *ante,* STATEMENT OF THE CASE, where the evidence is digested, and the objections quoted in full as required by Rule 18(d).

4. The trial court, Judge Harrison, erred in overruling the objections of appellants to the testimony of the federal narcotic and state officers relating to their entry into the home of Ruth Williams without a warrant of search or of arrest and the seizure of the evidence, Government's Exhibits 7-A, 7-B, 8, 8-A, 8-B, 8-C, 8-D and 9. [Rep. Tr.

pp. 229, 373, 384.] This evidence is digested as required by Rule 18(d) and the objections quoted in full, *ante,* under III, STATEMENT OF THE CASE. The exhibits mentioned are the items seized from Ruth Williams' home and premises on February 24, 1958, and they are the same items as those entered in the inventory in the return of the search warrant, page 5 of the appendix. Upon the offer by the Government of the exhibits, counsel for appellants renewed the objections that he had made at the beginning to the testimony of the witnesses and to the admission of the paraphernalia in evidence and the court stated:

> "The Court: *I will state now, Mr. Neblett, that the admission of any of the articles that were obtained in the home of Mrs. Williams in evidence will be subject to your objections and the rulings heretofore made. Does that cover the situation?"* [Rep. Tr. pp. 382-384.]

5. The trial court, Judge Harrison, erred in denying the separate motions for acquittal made on behalf of each of the appellants Williams and Cook at the conclusion of the Government's case. The motions are as follows:

> "Mr. Neblett: If your Honor please, I desire to make a separate motion for Ruth Williams for acquittal and a separate motion for Fred Cook for acquittal at this time on the grounds that the evidence is insufficient to sustain a conviction as to either one of those defendants." [Rep. Tr. p. 570, line 22, to p. 571, line 1.]

In denying the motions, the court said:

> "The Court: Well, I feel the evidence on these counts *involving Mrs. Williams and Mrs. Bryant, the substantive counts, the evidence is not strong but I think it is sufficient for a jury to pass upon. The fact*

that very shortly after the sale some of the money showed up in the possession of the defendant Williams is certainly to be considered by the jury. It is circumstantial evidence that they may or may not convict or acquit the defendant on.

I will agree the evidence against Williams and Cook is much weaker than it is against the other defendants, but I think it is sufficient and I think it would be an abuse of my prerogative to grant a judgment of acquittal as to those counts.

I think it is a jury question.

If the jury convicts them it would be a question then to be determined on a motion for a new trial or judgment of acquittal after a verdict, but I think it is a question that should be submitted to the jury."

* * * * * * * *

"The Court: Counsel, I feel that the matter should be submitted to the jury for its determination and verdict.

The matter will be submitted to the jury as to each defendant and as to each count.

Of course, I think the strongest evidence is against the defendant Bryant. To me, as long as the jury is not present, it is very strong, but as to the other defendants, including the defendant Juanita Smith, except the fact that these people were in such close contact with each other and apparently were delivering heroin to these various places, with all these three cars involved—I don't know whether they have been impounded by the Government or not, but I think it is getting down to a point where the evidence here is sufficient for the jury to at least pass upon the question." [Rep. Tr. p. 578, lines 6-24; p. 580, lines 2-16.]

6. The trial court, Judge Harrison, erred in denying appellants' motion to strike all of the evidence of the items turned up upon the search of Ruth Williams' home and the articles there seized. The motion was made at the conclusion of the Government's case. The motion and the ruling thereon are as follows:

> "Mr. Neblett: The court will recall that I made a motion to—pardon me—*I made an objection to all of the evidence which was introduced that was turned up at the search and seizure at 5417½ South Wilton, and the court overruled that objection subject to a motion to strike. I now would like to renew my motion to strike and to submit it without argument.*
>
> The Court: *The motion is denied.*" [Rep. Tr. p. 592, line 20, to p. 593, line 2.]

7. The trial court, Judge Harrison, erred in permitting the Government, after the close of the case, to reopen and offer in evidence the alleged confession of appellant Cook.

> "Mr. Sheridan: I think this will have to be done outside of the jury. It concerns the confession from the defendant Fred Cook. At this time, after talking it over with my office, they think we should put the confession into evidence, and I know Mr. Neblett has the request to take it up on voire dire outside of the jury before we offer the confession, and I want to give him the opportunity and let him know that is my intention of offering this confession of the defendant Fred Cook into evidence.
>
> The Court: I think it should be heard outside of the presence of the jury to see whether or not it is voluntary." [Appx. pp. 6-7; Rep. Tr. p. 644, line 19, to p. 645, line 5; p. 646, lines 14-16.]

The appellant Cook objected to the confession:

> "Mr. Neblett: I think that is all, your Honor. I renew our objection. It hasn't been shown by the Government it (the confession) was a voluntary statement. He was at that time under restraint. I renew the objection on that ground.
>
> The Court: *I think that is a question for the jury whether it was free and voluntary.*
>
> I might instruct the jury at this time that this (the confession) *is only binding upon the defendant Fred Cook and is not to be considered as evidence whatsoever as to any of the other defendants in the case.* And, also, as far as this statement is concerned if the jury feels it was unfairly taken in any way, shape or form, they are to disregard it.
>
> Mr. Sheridan: *I want to state for the record the Government offers that particular exhibit only as to Fred Cook.*
>
> The Court: It will be admitted, and you can read it to the jury." [Rep. Tr. p. 727, line 21, to p. 728, line 13.]

The court admitted the alleged confession into evidence as Government's Exhibit 16 and directed that it be read to the jury. Exhibit 16 was read to the jury by United States Attorney, Mr. Sheridan. [Rep. Tr. p. 728, line 14, to p. 731, line 19.] In order to comply with Rule 18(d) of this court, we refer the court to Appendix, pages 6 and 7, where Exhibit 16 is reproduced in full.

8. The trial court, Judge Harrison, erred in denying the separate motions made at the close of the case on behalf of appellant Ruth Johnson Williams and appellant

Fred Cook, Jr., for an acquittal. The motion was as follows:

> "Mr. Neblett: If your Honor please, I would like to make separate motions on behalf of the defendant Ruth Johnson Wiliams and the defendant Fred Cook, Jr. for acquittal pursuant to Rule 29(b) of the Federal Rules of Criminal Procedure, on Counts Five, Six, Seven and Eight of the indictment.
>
> Insofar as Ruth Williams is concerned, Ruth Williams is mentioned in Counts Five, Six, Seven and Eight, and Fred Cook is mentioned in Counts 5, 6 and 8. He is omitted from Count Seven.
>
> The Court: You are making the same motion for judgment of acquittal?
>
> Mr. Neblett: Definitely, your Honor.
>
> The Court: Motion denied." [Rep. Tr. p. 780, lines 5-18.]

9. The trial court, Judge Harrison, erred in not dismissing the action on the appellants Williams and Cook's motions to acquit made at the close of the Government's case and at the close of the case, as the court did not require the Government to divulge the identity of the informer. [Rep. Tr. pp. 237-339, 287-290, 506-507, 551-557.]

10. The trial court, Judge Harrison, erred in denying the motion of appellant Williams for acquittal and motion in the alternative for a new trial made pursuant to the provisions of Rule 29(b) of the Federal Rules of Criminal Procedure. [Tr. pp. 83-86.]

11. The trial court, Judge Harrison, erred in denying the motion of appellant Cook for acquittal and motion in the alternative for a new trial made pursuant to the provisions of Rule 29(b) of the Federal Rules of Criminal Procedure. [Tr. pp. 87-89.]

V.
SUMMARY OF ARGUMENT.

The search by federal and state narcotics officers of appellant Ruth Johnson Williams' home at 5417½ South Wilton Place, Los Angeles, California, February 24, 1958, under a void search warrant, was done in violation of appellant's rights guaranteed to her by the Fourth Amendment to the Constitution and the motion of appellant Ruth Johnson Williams to suppress the evidence seized during that illegal search and seizure should have been granted.

Federal Rules of Criminal Procedure, Rule 41;

Perry v. United States (C. A. 9, 1926), 14 F. 2d 88, 89;

Brown v. United States (C. A. 9, 1925), 4 F. 2d 246, 247;

Byars v. United States (1927), 273 U. S. 28, 47 S. Ct. 248;

United States v. Di Re (1948), 332 U. S. 581, 68 S. Ct. 222;

Johnson v. United States (1947), 333 U. S. 10, 68 S. Ct. 367.

The search of appellant Williams' home, having been made under a void search warrant, the result was the same as if the search had been made without a search warrant and seizure of the evidence thereunder cannot be justified as an incident to the arrest of the accused, as the arrest of the accused without a warrant is no more defensible than a search under a void search warrant.

Baumboy v. United States (C. A. 9, 1928), 24 F. 2d 512, 513;

United States v. Baldocci (D. C. S. D. Cal. N. D. 1930), 42 F. 2d 567.

Belief on the part of the arresting officers, however well-founded, that narcotic drugs were concealed in appellant Ruth Williams' dwelling house, furnished no justification for the search of her home without a warrant. Searches of homes without a warrant have universally been held to be unlawful notwithstanding facts unquestionably showing probable cause.

Agnello v. United States (1925), 269 U. S. 20, 46 S. Ct. 4;

Johnson v. United States (1947), 333 U. S. 10, 68 S. Ct. 367;

Trupiano v. United States (1948), 334 U. S. 699, 68 S. Ct. 1229;

McDonald v. United States (1948), 335 U. S. 451, 69 S. Ct. 191;

Miller v. United States (1958), 357 U. S. 301, 78 S. Ct. 1190;

Jones v. United States (1958), 357 U. S. 493, 78 S. Ct. 1253;

Poldo v. United States (C. A. 9, 1932), 55 F. 2d 866;

Giordenello (1958), 357 U. S. 480, 78 S. Ct. 1245.

Where a home, as Ruth Williams' was, is entered by officers without a warrant for the purpose of making an arrest, the arrest is illegal and any evidence turned up, if admitted at the trial, a conviction following will be reversed.

18 U. S. C., Sec. 3109;

People v. Brown (1955), 45 Cal. 2d 640;

Work v. United States (C. A. D. C., 1957), 243 F. 2d 660;

Woods v. United States (C. A. D. C., 1957), 240 F. 2d 37;

Watson v. United States (C. A. D. C., 1957), 249 F. 2d 106;

Williams v. United States (C. A. D. C., 1956), 237 F. 2d 789;

Poldo v. United States (C. A. 9, 1932), 55 F. 2d 66;

Johnson v. United States, supra;

Trupiano v. United States, supra;

McDonald v. United States, supra;

Miller v. United States, supra;

Jones v. United States, supra.

When it appears, as it did here, that the search of Ruth Williams' home and not the arrest was the real object of the officers in entering upon the premises, and the arrest is a pretext for, or at most an incident to the search, the search is not reasonable within the meaning of the Fourth Amendment.

18 U. S. C., Sec. 3109;[3]

McKnight, et al. v. United States (C. A. D. C., 1950), 183 F. 2d 977;

Miller v. United States, supra;

Baumboy v. United States, supra.

A federal agent, when obtaining evidence for a federal prosecution, is obliged to obey the Federal Rules of Criminal Procedure relating to searches and seizures.

Rea v. United States (1956), 350 U. S. 214, 76 S. Ct. 292.

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[3]"§3109. The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant. June 25, 1948, c. 645, 62 Stat. 820."

The essence of a statutory provision or rule of law forbidding the acquisition of evidence in a certain way is not merely that the evidence so acquired shall not be used before the court in a criminal trial, but that it shall not be used at all.

Nardone v. United States (1939), 308 U. S. 338, 60 S. Ct. 266;

Weiss v. United States (1939), 308 U. S. 321, 60 S. Ct. 269.

The entry of federal narcotic officers and the Los Angeles deputy sheriffs upon Ruth Johnson Williams' premises at 5417½ South Wilton Place, Los Angeles, California, without a warrant of arrest and without a valid search warrant, and the arrest of Ruth Johnson Williams and Fred Cook, Jr., within the premises was illegal and void. Motions of appellants Ruth Johnson Williams and Fred Cook, Jr. to suppress the evidence turned up as a result of such search and seizure should have been granted, as probable cause for the belief that a seizable article is in a dwelling house does not authorize a search of the house without a search warrant, although it may be sufficient to obtain a search warrant.

United States Constitution, 4th Amend.;[4]

18 U. S. C., Sec. 3109;

F. R. C. P., Rules 3, 4, 41;

Papani v. United States (C. A. 9, 1936), 84 F. 2d 160;

Lee v. United States (C. A. D. C., 1956), 232 F. 2d 354.

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[4]"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Federal narcotic officers Richards and Gilkey, who conducted the search and participated in the arrest of the appellants, were authorized by statute to make the arrest and to conduct the search without the aid of state officers. (26 U. S. C., Sec. 7607, effective July 18, 1956.) However, prior to the adoption of Section 7607, participation by a federal officer with state officers in making an arrest or search, however small, made the operation a federal one.

Byars v. United States, supra;

Lustig v. United States (1949), 338 U. S. 74, 69 S. Ct. 1372.

Evidence obtained in violation of one defendant's Constitutional guarantees against unreasonable search and seizure is inadmissible against another defendant tried with him in the same action.

McDonald v. United States, supra.

California, where the offenses charged in the indictment are laid, has adopted the exclusionary rule.

People v. Cahan (1955), 44 Cal. 2d 434;

Badillo v. Superior Court (1956), 46 Cal. 2d 269.

The seizure of the paraphernalia from appellant Williams' home itemized in the return on the search warrant (Appx. p. 5) and admitted in evidence over the objection of appellants was prejudicial error.

Kremen v. United States (1957), 353 U. S. 346, 77 S. Ct. 828.

An arrest or search on an illegal warrant violates the Fourth Amendment to the Constitution and a conviction obtained on such evidence will be reversed.

Giordenello v. United States, supra;

Agnello v. United States, supra;

Miller v. United States, supra;

Jones v. United States, supra.

The refusal of the court to compel the officers to reveal the true identity of the informer required a dismissal of the case on appellants' motions to acquit.

Roviaro v. United States (1957), 353 U. S. 53, 77 S. Ct. 623;

People v. McShann (1958), 50 Cal. 2d 802;

Priestley v. Superior Court (1958), 50 Cal. 2d 812.

The alleged confession of appellant Cook, taken from him in the federal narcotic office in the Federal Building in Los Angeles by Malcolm Richards, federal narcotic officer, during the period of his unlawful detention, within the meaning of Federal Rules of Criminal Procedure, Rule 5(a), 18 U. S. C. A., rendered inadmissible the statements elicited from Cook while he was being so unlawfully detained.

Mallory v. United States (1957), 354 U. S. 449, 77 S. Ct. 1356;

Watson v. United States (C. A. D. C., 1957), 249 F. 2d 106;

Carter v. United States (C. A. D. C., 1957), 252 F. 2d 608.

VI.

ARGUMENT.

POINT I.

The Search by Federal and State Narcotic Officers of Appellant Ruth Williams' Home Under Color of a Void Search Warrant Violated Her Constitutional Rights Under the Fourth Amendment to the Constitution and Appellant Williams' Motion to Suppress the Evidence Seized During the Illegal Search Should Have Been Granted.

There is no dispute over the Government's version of the facts. In the afternoon of February 24, 1958, at around 3:00 p.m., federal narcotic officers Malcolm Richards and William Gilkey, accompanied by deputy sheriffs of Los Angeles County, Gillette, Landry and Farrington, entered the gate off the alley opening into the small yard of Ruth Wiliams' home. Federal narcotic officer Richards and deputy sheriffs Gillette, Landry and Farrington went up the staircase on the outside wall of Williams' apartment, to the entrance to her living quarters. Federal narcotic officer Gilkey went into the yard and rumpus room and washroom which were downstairs under the living quarters of Mrs. Williams. When Richards and the three deputy sheriffs reached the landing at the top of the stairs, on which there is a door, the entrance to the living quarters, the doors, which consisted of a wire screen door and a regular door, were closed. The officers knocked on the screen door but received no response. They then tried the door, found it unlocked and entered the house. They presented the search warrant which federal narcotic officer Richards had to Williams, whom they found standing in one of the two bedrooms. Apparently, she had just gotten out of bed in

response to the knocking, but the officers entered so quickly after a knock or so that she was unable to inquire as to who was coming in. After showing appellant Williams the search warrant, the officers used up about two hours in which they made a thorough search of the upstairs living quarters, which consisted of a kitchen, a dinette, hallway, living room, two bedrooms and bathroom, and a thorough search of the rumpus room and washroom below, and the yard of Ruth Williams' apartment.

No narcotics were found in the living quarters, and none were found in the under part of the house or the yard. Four small brown envelopes were found in a garbage or trash can in the back, containing a white powdery substance which was afterwards determined to be heroin. There were some five or six trash cans in the back of the four-flat units which front on South Wilton Place. The four tenants occupying the units facing on Wilton Place in front of Ruth Williams' apartment, which was a made over garage, used in common with appellant Williams the five or six trash cans, in one of which the narcotics were found. [Appx. pp. 4-5; Rep. Tr. pp. 269-273; 273-280, 280-281, 301-318.]

On April 14, 1958, appellant Ruth Williams filed a motion to suppress the evidence seized upon the search of her home and premises at 5417½ South Wilton Place, Los Angeles, February 24, 1958, upon the ground that the search warrant upon which the search and seizure were made was void on its face under Federal Rules of Criminal Procedure, Rule 41(e). The motion came on for hearing April 28, 1958, before Honorable William C. Mathes, Judge presiding. At the conclusion of the hearing, the court directed the attorney for the Government to submit a formal order denying the motion. The formal order was

submitted and was filed and entered by the court May 1, 1958. [Tr. pp. 36-38.] The court decided in the formal written order that the search warrant was void on its face and that it "standing alone offered no justification for the search of appellant Williams' residence." [Tr. p. 36, line 21, to p. 37, line 3.]

After holding the search warrant void, the court went on in its order to hold that appellant Williams "was arrested without a warrant of arrest, February 24, 1958, in her residence by state and federal law enforcement officers" [Tr. p. 37, lines 4-7]; that the arrest was lawful in that the search and seizure of the evidence sought to be suppressed was incident to a lawful arrest; and that for these reasons the motion to suppress would be denied. [Tr. p. 37, line 4, to p. 38, line 8.]

Believing that the court had erred in holding that the alleged arrest of Ruth Williams after the wrongful entry into her home without a warrant of arrest was invalid and that the search and seizure of the evidence sought to be suppressed had been wrongfully seized within the meaning of the Federal Rules of Criminal Procedure, Rules 3, 4, 5 and 41, the appellants Williams and Cook moved the court to suppress the evidence seized at Ruth Williams' home and to suppress the alleged confession taken from Cook while he was being illegally detained at the federal narcotic office in the Federal Building in Los Angeles for some two to three hours prior to the time he was booked. [Tr. pp. 41-43.] The motion prayed that the court reconsider paragraphs 4, 5, 6 and 7 of the formal order, entered May 1, 1958 [Tr. p. 37, lines 4-21; pp. 41-43], denying the motion of Ruth Williams to suppress the evidence seized from her home on February 24, 1958, pursuant to the void search warrant and inventory thereon,

and further prayed the court to suppressed the alleged written statement or confession of appellant Cook. [Govt. Ex. 16; Appx. pp. 6-7.] The second motion alleged that the search of Ruth Williams' home and seizure of the evidence therefrom was made incident to a void arrest without a warrant. [Tr. p. 41, line 20, to p. 42, line 2.] The motion came on for hearing before Judge Mathes May 19, 1958, and was disposed of by the following Minute Order: "The Court orders said motion to suppress evidence denied without prejudice." [Tr. p. 60, lines 16-17.]

Appellants shall devote their argument on this point solely to the question of the invalidity of the arrest and the void search and seizure following the illegal arrest, as the search warrant under which the search was made was held by Judge Mathes to be void. Further consideration of the validity of the search warrant would be the presentation to this Court of a moot question.

Appellants Williams and Cook contended before Judge Mathes on the motions to suppress and before Judge Harrison on the renewal of the two motions to suppress, the objections to the receipt in evidence of the paraphernalia seized from Ruth Williams' home and premises, the motion to strike the testimony of the officers and to strike the exhibits, the motion to acquit at the conclusion of the Government's case, and the motion to acquit and in the alternative a motion for new trial, that the entry into Ruth Williams' house and the so-called arrest and search of her premises and the seizure of the evidence alleged to have been done pursuant to this arrest, were all illegal and void within the Fourth Amendment to the Constitution and Rules 3, 4, 5 and 41 of Federal Rules of Criminal Procedure.

Before Judge Mathes, who passed upon the motions to suppress, and which were refused consideration by Judge Harrison on the ground that Judge Mathes has passed upon them, appellants mainly relied upon the following cases:

Johnson v. United States, supra;

McDonald v. United States, supra;

Trupiano v. United States, supra;

Agnello v. United States, supra;

Poldo v. United States, supra;

Work v. United States, supra;

Woods v. United States, supra;

McKnight v. United States, supra.

Appellants also relied upon:

18 U. S. C., Sec. 3109, adopted June 25, 1948;

26 U. S. C., Sec. 7607,[5] approved July 18, 1956;

F. R. C. P., Rules 3, 4, 5, 41.

Taking the Government's version of the facts as true, the holding in *Johnson v. United States, supra,* should

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[5]§7607. The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401(1) of the Tariff Act of 1930, as amended; 19 U.S.C., sec. 1401(1), may—

(1) carry firearms, execute and serve search warrants and arrest warrants, and serve subpenas and summonses issued under the authority of the United States, and

(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.

end this case in favor of the appellants. Quoting from the *Johnson* case,

> "The Government contends, however, *that this search without warrant must be held valid because incident to an arrest.* This alleged ground of validity requires examination of the facts to determine whether the arrest itself was lawful. Since it was without warrant, it could be valid only if for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty. * * *
>
> *"Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do.* An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine the 'right of the people to be secure in their persons, houses, papers and effects,' *and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."* (333 U. S. 15-17, 68 S. Ct. 369-371.)

We see no way to distinguish the *Johnson* case from the case at bar except that our case is a stronger one against the Government than the *Johnson* case. In the *Johnson* case, a detective of the Seattle Police force, with four federal narcotic agents, went to a hotel on a tip by an informer that opium was being used in a room in the hotel occupied by the defendant in that case. The officers, experienced narcotic officers, smelled an odor in the hallway of the hotel which they identified as odors emanating from the smoking of opium. The odor led the officers to

Room 1. The officers knocked on the door and a voice inside asked who was there. The reply was, "Lt. Belland." After some delay and a shuffling noise in the room, the defendant opened the door. The officers said, "I want to talk to you about the opium smell in this room"; the defendant then stepped back and admitted us. Defendant denied that there was any opium smell emanating from the room. The officers then said, "consider yourself under arrest because we are going to search the room." The search turned up opium in the room and smoking apparatus, warm, as having been apparently recently used. This evidence the District Court refused to suppress before trial and admitted over the defendant's objection at the trial. The defendant was convicted and the Court of Appeals for the 9th Circuit affirmed. (162 F. 2d 562.)

The Supreme Court held that there was no excuse for making the search under such circumstances without a search warrant or to arrest the defendant without a warrant of arrest and then to claim that the search and seizure were valid as an incident to an alleged valid arrest. The conviction of the defendant was reversed, the Court saying, at 333 U. S., pages 13-15, 68 Supreme Court, page 369:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. *Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to*

a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. *When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.* There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to bypass the constitutional requirement. *No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time will disappear.* But they were not capable at any time of being reduced to possession for presentation to court. The evidence of their existence before the search was adequate and the testimony of the officers to that effect would not perish from the delay of getting a warrant.

"If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required."

In *Trupiano v. United States, supra,* which followed the *Johnson* case, it was held that a valid arrest does not necessarily make a search, incident to the arrest without a search warrant, valid. The Supreme Court said in the *Trupiano* case, 334 U. S., at 704, 705, 708, 68 S. Ct., at 1232 and 1234:

> ". . . And since this arrest was valid, the argument is made that the seizure of the contraband open to view at the time of the arrest was also lawful. Reliance is here placed on the long line of cases recognizing that an arresting officer may look around at the time of the arrest and seize those fruits and evidences of crime or those contraband articles which are in plain sight and in his immediate and discernible presence. . . . (Citing cases.)
>
> "We sustain the Government's contention that the arrest of Antoniole was valid. The federal agents had more than adequate cause, based upon the information supplied by Nilsen, to suspect that Antoniole was engaged in felonious activities on the farm premises. Acting on that suspicion, the agents went to the farm and entered onto the premises with the consent of Kell, the owner. There Antoniole was seen through an open doorway by one of the agents to be operating an illegal still, an act felonious in nature. His arrest was therefore valid on the theory that he was committing a felony in the discernible presence of an agent of the Alcohol Tax Unit, a peace officer of the United States. The absence of a warrant of arrest, even though there was sufficient time to obtain one, does not destroy the validity of an arrest under these circumstances. Warrants of arrest are designed to meet the dangers of unlimited and unreasonable arrests of persons who are not at the moment committing any crime. . . .

". . . *But we cannot agree that the seizure of the contraband property was made in conformity with the requirements of the Fourth Amendment.* It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable. . . . (Citing cases.) . . . This rule rests upon the *desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. United States v. Lefkowitz, supra,* 285 U. S. at page 464, 52 S. Ct. at page 423. In their understandable zeal to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed. To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement. . . .

"A search or seizure without a warant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest. The mere fact that there is a valid arrest does not ipso facto legalize a search or seizure without a warrant. *Carroll v. United States, supra,* 267 U. S. at page 158, 45 S. Ct. at page 287. *Otherwise the exception swallows the general principle, making a search warant completely unnecessary wherever there is a lawful arrest."*

It does not matter what an unreasonable search and seizure turns up, as the guarantee of the Fourth Amendment to the Constitution protects the privacy of both the innocent and guilty. (*McDonald v. United States, supra,* 335 U. S. 453, 69 S. Ct. 192.) In the *McDonald* case, the Government sought to place the lawfulness of the search on the lawfulness of the arrest and so justify the search and seizure without a warrant. That, the Supreme Court said, could not be done. The Court went on to say, at 335 U. S. 455-456, 69 S. Ct. 193:

> "Here, as in Johnson v. United States and Trupiano v. United States, *the defendant was not fleeing or seeking to escape. Officers were there to apprehend petitioners in case they tried to leave.* . . .
>
> "We are not dealing with formalities. The presence of a search warrant serves a high function. *Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted.* And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."

The Supreme Court decided in the *McDonald* case that the motion to suppress the evidence seized should have been granted and that the admission at the trial of the evidence seized over the objection of the defendant McDonald, required that the convictions of him and his co-defendants be reversed although his co-defendants, tried jointly with McDonald, took no appeal from their judgments of conviction. This ruling is particularly applicable to the appellant Cook, who was tried jointly with appellant Williams.

The case of *Work v. United States, supra,* is directly in point. In the *Work* case, the Court of Appeals for the District of Columbia reversed the conviction of a woman of whom they had knowledge that she was a user of and possessor of narcotics. The officers went to defendant's home without a search warrant and opened the door and entered a few steps after receiving no answer to a knock on the door. The defendant was arrested and a search was made of her home. The appellant, in that case, walked past the officers, making some comment about their having opened the door. She went out of the open door through which the officers had entered, walked a few steps across the porch, went down another few steps and turned down another step or two to an area under the porch, where she was seen by the officers to make certain motions as if putting something in a trash can located under the porch. The trash can was examined and a container was taken out of the can, which held narcotics. The Court reversed the woman's conviction, holding that the entry into her home was unlawful and that the evidence should have been suppressed, citing *Agnello v. United States, supra.* The cases cited and quoted from above would seem to be conclusive of the unlawfulness of

the entry into appellant Williams' home and the seizure of the alleged narcotic out of the community trash can serving five units of the entire flat and rear of the converted garage living quarters of Mrs. Williams.

There are three cases decided by the Supreme Court of the United States subsequent to the order of the lower court, Judge Harrison, denying the separate motions of appellants Williams and Cook for acquittal, and motions in the alternative for a new trial. [Tr. pp. 83-86, 87-88.] These motions of the appellants were denied June 13, 1958. [Tr. p. 98.] Those three cases just mentioned which we contend are directly in point in favor of the appellants Williams and Cook, and are determinative of these appeals in their favor, are: *Miller v. United States,* decided June 23, 1958, 357 U. S. 301, 78 S. Ct. 1190; *Giordenello v. United States,* decided June 30, 1958, 357 U. S. 480, 78 S. Ct. 1245; *Jones v. United States,* decided June 30, 1958, 357 U. S. 493, 78 S. Ct. 1253.

In *Miller v. United States,* a prosecution for violation of the federal narcotic laws (21 U. S. C., Sec. 174), it was held that the police were not entitled to enter a dwelling even though in response to an inquiry by the defendant occupant, "Who is there?", the police replied, "Police." Such colloquy was held insufficient to meet the requirements of Section 3109, 18 U. S. C., and that a motion to suppress the evidence seized should have been granted and that its admission at the trial over the objection of the defendant required that appellant's conviction be reversed.

In the *Giordenello* case, the principle was reaffirmed, that the language of the Fourth Amendment, *that no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the person or*

thing to be seized, applies to warrants of arrest as well as to search warrants. (357 U. S. 486, 78 S. Ct. 1250.) In that case, the officers procured a warrant of arrest for petitioner and arrested him on the street as he was coming out of a residence, not his own. The officers had shadowed petitioner from his own home to the place where he was arrested. His person was searched and heroin found on him. The warrant for petitioner's arrest was issued by a United States commissioner on the complaint of a federal officer that Giordenello had received and concealed some narcotic drugs after knowledge of its illegal importation. The Supreme Court held that the affidavit for the warrant of arrest was insufficient and the warrant void, as the affidavit did not contain any affirmative allegations that the complaining officer spoke with personal knowledge of the matters stated in the affidavit. Giordenello's conviction was reversed, the Court holding that since the arresting officer had no search warrant, the heroin seized from the person of Giordenello, at the time of his arrest, was admissible in evidence only if its seizure was incident to a lawful arrest. The evidence seized was not admissible as the arrest was unlawful because the affidavit for the warrant of arrest was insufficient to establish probable cause. See also a like ruling in *Papani v. United States* (C. A. 9, 1936), 84 F. 2d 160.

The Government contended in the *Giordenello* case that the arrest was controlled by the law of Texas, which permits an arrest without a warrant. The Supreme Court declined to accept the contention, citing *United States v. Di Re, supra,* and *Johnson v. United States, supra.* The arrest was held invalid under the Federal Constitution and Federal Rules of Criminal Procedure as agent Finley, who participated in the arrest, search and seizure, was a

federal narcotic officer and that his participation made the operation a federal one. That rule has been the law of the Ninth Circuit for many years. (*Baumboy v. United States* (C. A. 9, 1928), 24 F. 2d 512; *Brown v. United States* (C. A. 9, 1925), 4 F. 2d 246; see also *Byars v. United States, supra; Lustig v. United States, supra.*) Congress conferred the power to make arrests on federal narcotic officers in 1956. (26 U. S. C., Sec. 7607.)

In *Jones v. United States, supra,* the Supreme Court held, in accord with the *well established doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling house, cannot of itself justify a search of the dwelling without a warrant.* The search of the dwelling in the *Jones* case was claimed by the Government to have been made incident to a valid arrest. The Court reversed the conviction, holding, in affect, that *where a search warrant is required for the search of a home, there can be no such thing as entry into the home and the search of it without a search warrant* whether or not the search is incident to a valid arrest. The Court held to the fast rule that a search of *a dwelling house is never valid unless made upon a search warrant which has been issued by a magistrate upon a proper showing of probable cause.*

In *Miller v. United States, supra,* federal and state officers went to petitioner's apartment in an apartment house where one of the state officers knocked on the door of the apartment. A person from within inquired, "Who's there?" The officers replied, "Police." The petitioner opened the door to the length of a door chain and asked what the officers were doing there. The petitioner then attempted to close the door. Without saying anything, the officers put their hands inside the door, pulled the chain

off and entered. The petitioner was arrested and $66 in marked currency was found in the house which had been paid out that morning by the officers to another person, an informer, to purchase narcotics. *The marked currency was admitted in evidence on the Government's contention that it was seized as incident to a lawful arrest. The Court held that the officers were without right to pull the chain off the door and enter the apartment and that the arrest of the petitioner was unlawful and that the admission in evidence of the marked money, over the objection of the petitioner, required a reversal of petitioner's conviction.*

POINT II.

The Erroneous Admission in Evidence, Over the Objection of Appellants, of the Paraphernalia Seized From Appellant Ruth Williams' Home Was Prejudicial Error Requiring the Reversal of Appellants' Convictions.

The articles seized in Ruth Williams' home by federal narcotic officer Richards, pursuant to the void search warrant, were itemized by him on the return of the warrant. (Appx. p. 5.) The return shows that officer Richards listed the articles seized in 14 different items, consisting of numerous articles, the number of which is difficult to determine from the inventory. The Government made a blanket offer of these several items as Exhibits 7, 7-A, 7-B, 8, 8-A, 8-B, 8-C, 8-D and 9. In addition to the objection to the articles that they had been illegally seized, counsel for appellants objected to the admission in evidence of the offered exhibits on the grounds, first, that

they were incompetent, irrelevant and immaterial and, secondly, that no proper foundation had been laid for their admission. The objection was overruled and the court admitted the exhibits in evidence. [Rep. Tr. pp. 382-386.]

Appellants contend that the admission of the conglomerate paraphernalia such as cans of milk sugar, corn starch, a half box of .32 caliber bullets, some rolls of scotch tape, some empty milk sugar cans, a stapling machine with a supply of staples, a shiek box with wrappings of six contraceptives, a paper tablet with certain markings, and things of the sort which were included in the exhibits, does, above all else, require a reversal of this case within the meaning of *Kremen v. United States* (1957), 353 U. S. 346, 77 S. Ct. 828, where the Supreme Court held that the admission of such miscellaneous articles voided the conviction. The Court said, 353 U. S., page 348, 77 S. Ct., page 829 of the opinion that:

> "* * * The majority of the Court are agreed that objections to the validity of the search and seizure were adequately raised and preserved. The seizure of the entire contents of the house and its removal some two hundred miles away to the F. B. I. offices for the purpose of examination are beyond the sanction of any of our cases. While the evidence seized from the persons of the petitioners might have been legally admissible, *the introduction against each of petitioners of some items seized in the house in the manner aforesaid rendered the guilty* verdicts illegal."

POINT III.

The United States Commissioner's File Demonstrates That the Testimony of the Officers, Relating the Circumstances of the Alleged Arrest of Appellant Williams and the Search of Her Home as an Incident to That Arrest, Is Untrue.

Prior to the time of the search of Ruth Williams' home by federal and state narcotic officers February 24, 1958, one Justin B. Burley and Malcolm P. Richards, a federal narcotic agent, appeared before United States Commissioner Theodore Hocke and made affidavits for a search warrant of the premises known as "5417½ So. Wilton." (Appx. pp. 1-3.) Commissioner Hocke forthwith issued a purported search warrant and delivered it to federal narcotic officer Malcolm P. Richards. (Appx. p. 4.) The return on the purported search warrant to which Malcolm P. Richards made affidavit before Commissioner Hocke on February 25, 1958, contains the following sworn statements of Richards (Appx. p. 5):

> "I received the attached search warrant 2/24, 1958, and have executed it as follows:
>
> "On 2/24, 1958 at 3:00 o'clock P.M., I searched ~~(the person)~~
> (the premises) described in the warrant and
>
> "I left a copy of the warrant with Mrs. Ruth J. Williams (name of person searched or owner at place of search) together with a receipt for the items seized.
>
> "The following is an inventory of property taken pursuant to the warrant: (here follows the inventory of the property seized)
>
> * * * * * * * *
>
> "This inventory was made in the presence of Agent Wm. Gilkey, Sgt. A. F. Landry, Deputy

Sheriff and William Farrington & Arthur Gillette, Deputies.

"I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ Malcolm P. Richards

"Subscribed and sworn to before me this 25th day of February, 1958.

/s/ Theodore Hocke
United States Commissioner."

(Appx. pp. 4-5.)

On February 25, the day after the search and seizure, Malcolm Richards appeared before Commissioner Hocke and swore to a complaint against appellants Williams and Cook, charging them with the sale and facilitation of the sale of heroin. [Tr. p. 1.] Obviuosly, the complaint was based solely on the statement or confession (Appx. pp. 6-7) of appellant Cook, taken from him by federal agent Richards, while Cook was being detained at the federal narcotic office in the Federal Building prior to the time he was booked in the County Jail. As already shown, from the officers' version of what happened, the officers left Ruth Williams' home about 5:00 o'clock on the afternoon of February 24, taking appellants Williams and Cook with them. Appellants were taken to the narcotics' office in the Federal Building at Los Angeles and detained there for approximately three hours, when they were booked in the Los Angeles County Jail on suspicion of trafficking in narcotics. The Los Angeles County Jail is just across Spring Street from the Federal Building and westerly from it.

The next morning, February 25, after the issuance of the complaint by Commissioner Hocke on federal narcotic

officer Richards' affidavit, Commissioner Hocke issued a warrant for the arrest of appellants Williams and Cook. The warrant was directed to the United States Marshal, or other authorized officer. The return on the warrant indicates that someone went over to the county jail and brought appellants Williams and Cook to the Federal Building to Commissioner Hocke's office, where they were arrested by the United States Marshal, February 25, 1958. [Tr. p. 2.] At the time of the arrest, Commissioner Hocke issued separate temporary commitments directed to the United States Marshal for appellant Williams and appellant Cook. The marshal acknowledged receipt of the commitments and made a return stating that he had committed each of the defendants to the Los Angeles County Jail. [Tr. pp. 3-6.]

Mere reference to the commissioner's record demonstates that the search of Ruth Williams' home was made under the void search warrant and not as an incident to the alleged arrest without a warrant, as the officers testified. The appellants were not arrested until some 18 hours after the search had been completed, and then on a warrant issued on a complaint, which complaint was obviously based solely on what appellant Cook had confessed to Malcolm Richards in the statement given while he was being detained by Richards in the federal narcotic office prior to the time that he was booked in the Los Angeles County Jail.

The only possible explanation of the untruthful testimony given by the officers is that they learned, from the first motion of Ruth Williams, filed April 14, 1958, to suppress the seized evidence, that the search warrant, under which her home was searched and the evidence inventoried in the search warrant was seized, was void on its face

because of the failure of the purported search warrant to comply with the provisions of Rule 41 of the Federal Rules of Criminal Procedure. Caught in this dilemma the officers cooked up the story of the arrest upon their entry into Ruth Williams' home in order to extricate themselves from that illegal entry, which they obviously had made under a void search warrant, and under which void search warrant they seized the evidence inventoried on the return of the search warrant.

It was pointed out by the Supreme Court, in *Miller v. United States, supra,* at page 312, 78 S. Ct. at page 1197, quoting from *United States v. Di Re, supra:*

> "We have had frequent occasions to point out that *a search is not to be made legal by what it turns up. In law, it is good or bad when it starts and does not change character from its success."*

The present case falls under the ban of the Supreme Court established in *McDonald v. United States, supra,* where Mr. Justice Douglas, speaking for the Court, held that *a valid search warrant in all cases is necessary for the search of a home, as the Fourth Amendment has interposed a magistrate between the citizen and the police,* as history has proved that *"the police cannot be trusted."* (335 U. S. pp. 455-456, 69 S. Ct. p. 193.)

POINT IV.

The Failure of the Officers to Disclose the Identity of the Informer Requires a Reversal of Appellants' Convictions.

The informer in this case participated in the offense. For that reason, Judge Mathes required the officers to name him. The officers named "Jesse Thomas." [Rep. Tr. pp. 287-290.] The officers consistently denied they knew where "Jesse Thomas" was at the time of the trial,

or where he at any time had lived, and testified that no effort had been made to find him; nor had he been subpoenaed by the Government as a witness. [Rep. Tr. pp. 506-507, 551, 556, 558.] As to the identity of the informer, the officers would go no further than to say, He is known to me as "Jesse Thomas." [Rep. Tr. pp. 287-290.] The vacillation of the officers brings this case squarely within *Roviaro v. United States* (1957), 353 U. S. 53, 77 S. Ct. 623. Naming the informer as "Jesse Thomas" cannot be distinguished from what the officers in the *Roviaro* case did when they named the informer as "John Doe." The indifference of the officers to the identity of "Jesse Thomas" who, according to their testimony, was a participant in the offenses charged in the indictment, requires a reversal of the convictions of appellants under the ruling in the *Roviaro* case, *People v. McShann* (1958), 50 Cal. 2d 802, and *Priestley v. Superior Court,* 50 Cal. 2d 812. Our position seems to have been made impregnable by the following quotation from *Roviaro v. United States* at page 61 of 353 U. S. and page 628 of 77 Supreme Court:

> ". . . Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen *where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause.* In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication."

It is interesting to note that in the two leading informer cases in California, decided October 1, 1958, *People v. McShann,* 50 Cal. 2d 802 and *Priestley v. Superior Court,* 50 Cal. 2d 812, the Supreme Court of California relies

upon the *Roviaro* case in establishing that in circumstances similar to those present here, *the identity of the informer must be revealed or the prosecution must suffer a dismissal of the case.*

POINT V.

The Evidence Was Insufficient to Sustain the Conviction of Either Appellant on Any One of the Counts of the Indictment on Which Each One Was Convicted. There Was No Evidence Introduced by the Government to Show a Conspiracy or to Show That Any Offense Was Committed Other Than the Statement or Confession of Cook (Appx. pp. 6-7) Which Was Admitted in Evidence as to Appellant Cook Only.

The motion to acquit made by each of appellants at the close of the Government's case, and before the case was reopened on motion of the Government to allow the Government to present the alleged confession of Cook (Appx. pp. 6-7), should have been granted. Upon denying the motion to acquit made at the close of the Government's case, the Court said:

> "I will agree the *evidence against Williams and Cook is much weaker than it is against the other defendants* but I think it is sufficient and I think it would be an abuse of my prerogative to grant a judgment of acquittal as to those counts. *I think it is a jury question.* If the jury convicts him *it would be a question then to be determined on motion for new trial or judgment of acquittal after a verdict, but I think it is a question that should be submitted to the jury.*" [Rep. Tr. p. 580.]

Appellants' separate motions to acquit were denied.

The United States Attorney, taking note of the Court's statement, and to save the Government's weak case against appellants, made a motion to reopen, for the purpose of offering the alleged confession of Cook into evidence. The motion was granted. [Rep. Tr. p. 646; Appx. pp. 6-7]. The jury was then excused, so that the admissibility of the confession could be determined out of the presence of the jury.

Federal narcotic officer Malcolm Richards was called and testified that he had interviewed appellant Cook at the federal narcotic office in the Federal Building, on February 24, from around 6:00 o'clock to 8:00 o'clock in the evening, and took the statement from him [Govt. Ex. 16; Appx. pp. 6-7], after which Cook was booked in the Los Angeles County Jail. No charges were filed against Cook until the next morning. Agent Richards testified the usual procedure is to take persons picked up for narcotics offenses to the narcotic office in the Federal Building, question them and take a statment from them if they are willing to give statements, and then book them in the county jail. This was the procedure followed in Cook's case. [Rep. Tr. pp. 687-782.] After the testimony of Richards, the Court admitted the confession of appellant Fred Cook as against Cook only. The jury was recalled and Cook's confession [Govt. Ex. 16] was read to the jury. [Rep. Tr. pp. 728-731.]

Government Exhibit 16 (Appx. pp. 6-7) was admitted over the objection of the appellants, made on the ground that the Government did not show that the statement was taken in compliance with Rule 5 of the Federal Rules of Criminal Procedure.

At this point, we digress to say that there is not a word of testimony in the record which tends to establish

a conspiracy. Thus, the Court's instructions on conspiracy which indicated there was a conspiracy, tended to confuse the jury and were prejudicial to both appellants. Nothing was shown by the prosecution to establish the conspiracy charged more than a mere suspicion. There is not one word of testimony in the record that Ruth Williams and Eddie Jewel Bryant ever knew or communicated with each other, directly or indirectly. The evidence is that Ruth Williams never at any time knew Eddie Jewel Bryant. There is some testimony connecting Ruth Williams with Juanita Smith, but Juanita Smith was found *not* to be a party to the conspiracy, *as she was acquitted.* Such evidence, which raises a mere suspicion of guilt was insufficient to convict the appellants on any of the counts upon which they were convicted.

Ong Way Jon v. United States (C. A. 9, 1957), 245 F. 2d 392;

Evans v. United States (C. A. 9, 1958), 257 F. 2d 121;

Robinson v. United States (C. A. 9, 1959), 262 F. 2d 645;

Krulewitch v. United States (1949), 336 U. S. 440, 69 S. Ct. 716;

Cash v. Culver (1959), 79 S. Ct. 432.

It is obvious from a mere reading of Cook's confession that its effect on the jury was highly prejudicial to the appellants. Juanita Smith, who was not mentioned in the confession and of whom the Court said the case, before the confession was admitted in evidence, was stronger against her than the weak case made against Williams and Cook, was acquitted. Counsel for appellants do not feel it worthwhile to consider further the evidence on Counts Five, Six and Seven. There just is not any admissible

or probative evidence in the record to sustain a conviction on any one of those counts of either appellant.

Count Eight, the conspiracy count, is obviously founded on Cook's confession, as the allegations of the conspiracy in that count paraphrase Cook's confession. [Tr. p. 16.]

As shown above, from the officers' testimony, Cook was picked up at Ruth Williams' home, 5417½ South Wilton Place, Los Angeles, California, in the afternoon of February 24, 1958. No complaint was filed against him and no warrant of arrest was issued or served on him until the forenoon of the following day, February 25, when the warrant was issued on a complaint sworn to by federal narcotic officer Malcolm P. Richards and served upon Cook in the commissioner's office by the United States Marshal. From these facts, it appears that Cook *was illegally detained* by the federal officers from the time he was picked up at 3:00 o'clock in the afternoon of February 24 until he was brought before the commissioner in the forenoon of the following day. During that period of some 18 hours, federal narcotic officer Malcolm P. Richards and his fellow officers removed Cook from appellant Williams' home at around 5:00 p.m. on February 24. Cook was first taken to the federal narcotic office in the Federal Building and held there for some three hours before he was booked in the Los Angeles County Jail. The officers took advantage of Cook's illegal detention in the federal narcotic office to extract from him the statement or confession, Government's Exhibit 16, reproduced in full on pages 6 and 7 of the Appendix.

We believe these facts bring Cook's confession squarely within *Mallory v. United States* (1957), 354 U. S. 449, 77 S. Ct. 1356, where the Supreme Court held that the detention of a defendant, in circumstances completely

analogous to the system used by the federal officers here in Cook's case, rendered a confession extracted from the defendant in such circumstances inadmissible as having been taken in violation of Rules 3, 4 and 5 of the Federal Rules of Criminal Procedure. The Court said, at pages 454-455 of the opinion, 77 Supreme Court pages 1359-1360, reversing the conviction of Mallory:

> "The scheme for initiating a federal prosecution is plainly defined. *The police may not arrest upon mere suspicion but only on 'probable cause.' The next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined.* The arrested person may, of course, be 'booked' by the police. *But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.*
>
> "The duty enjoined upon arresting officers to arraign 'without unnecessary delay' indicates that the command does not call for mechanical or automatic obedience. Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. *But the delay must not be of a nature to give opportunity for the extraction of a confession.*"

Appellants respectfully assert that the conviction of each of them should be reversed and the indictment dismissed.

Respectfully submitted,

Wm. H. Neblett,

E. W. Miller,

Attorneys for Appellants.

APPENDIX.

Defendant Williams' Exhibit A on Motion to Suppress Evidence.

Form A. O. 106

UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF CALIFORNIA
Central Division

Commissioner's Docket No. 23
Case No. 235

UNITED STATES OF AMERICA
v
5417½ S. Wilton
.....
.....

AFFIDAVIT FOR SEARCH WARRANT

BEFORE .....
Name of Commissioner

The undersigned being duly sworn deposes and says:
That he (has reason to believe) ~~(is positive)~~ that ~~(on the person of)~~ (on the premises known as)
5417½ S. Wilton.....
in the Southern District of California, there is now being concealed certain property, namely heroin.....
here describe property
which are in violation of 21 U.S.C. 174.....
here give alleged grounds for search and seizure

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:
See attached affidavits

JUSTIN B. BURLEY
Signature of Affiant.
MALCOLM P. RICHARDS
Official Title, if any.
Narcotic Agent

Sworn to before me, and subscribed in my presence, Feb. 24, 1958.
THEODORE HOCKE
United States Commissioner

AFFIDAVIT

On February 21, 1958, at approximately 10:20 A.M., affiant met and conversed with Eddie Jewel Bryant. Affiant told Bryant that he wanted to purchase an ounce of heroin from Bryant. Bryant told affiant that this was agreeable and affiant handed $250 to Bryant. And at approximately 11:10 A.M., Bryant and affiant went to vicinity of 54th and Van Ness. Affiant departed from Bryant's 1954 Oldsmobile. Bryant returned to said vicinity at approximately 11:40 A.M. and handed 390 grains of heroin to affiant.

Justin Burley

JUSTIN BURLEY

Date 2-24-58

Subscribed and sworn to before me this..... day of Feb. 24, 1958, ...19

THEODORE HOCKE

United States Commissioner for the Southern District of California, at Los Angeles.

AFFIDAVIT

On February 21, 1958 at approximately 11:15 A.M., affiant saw Eddie Jewel Bryant park an automobile in front of 5417½ South Wilton Place and enter said residence. At 11:35 A.M., affiant saw Bryant leave said residence and enter her 1954 Oldsmobile and drive away.

Malcolm P. Richards
MALCOLM P. RICHARDS

Subscribed and sworn to before me this ..... day of Feb. 24, 1958, ...19

THEODORE HOCKE
United States Commissioner for the Southern District of California, at Los Angeles.

Defendant Williams' Exhibit B on Motion to Suppress Evidence.

Form A. O. 93 (Revised Oct. 1953) Search Warran

UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF CALIFORNIA
Central Division

Commissioner's Docket No. 23
Case No. 230

UNITED STATES OF AMERICA
v
5417½ S. Wilton
.....
.....

SEARCH WARRANT

To

Affidavit having been made before me by that he (has reason to believe) (is positive) that ~~(on the person of)~~ (on the premises known as) 5417½ S. Wilton in the Southern District of California there is now being concealed certain property, namely heroin.....
here describe property
which is concealed in violation of 21 U.S.C. 174.....
here give alleged grounds for search and seizure
and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the ~~(person)~~ (premises) above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the ~~(person)~~ (place) named for the property specified, serving this warrant and making the search (in the daytime) ~~(at any time in the day or night)~~ and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 24th day of Feb. 24, 1958.

THEODORE HOCKE,

RETURN

"I received the attached search warrant 2/24, 1958, and have executed it as follows:

"On 2/24, 1958 at 3:00 o'clock P.M., I searched (~~the person~~ / the premises) described in the warrant and

"I left a copy of the warrant with Mrs. Ruth J. Williams together
Name of person searched or owner or "at the place of search"
with a receipt for the items seized.

"The following is an inventory of property taken pursuant to the warrant:

1 small bottle of milk sugar (full)
1 " " " corn starch (½ full)
1 box .32 automatic bullets
1 " .30-.30 shells (½ full)
$15.00 marked Official Advance Fund; (1 $10.00 & 1-$5.00)
4 rolls Scotch Tape
(2 Empty Milk sugar cans
(1 Milk sugar can containing plastic bag w/small brn
In Yard (envelope w/alleged narcotics—heroin.
(1 can containing 4 small brn envelopes w/envelopes
(w/alleged narcotics—heroin
1 stapling machine w/staples
1 "Sheik" box w/wrappings of 6 contraceptives
1 paper tablet w/markings

"This inventory was made in the presence of Agent Wm. Gilkey, Sgt. A. F. Landry, Deputy Sheriff and William Farrington & Arthur Gillette, Deputies.

"I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

MALCOLM P. RICHARDS

Subscribed and sworn to and returned before me this 25th day of February, 1958.

THEODORE HOCKE
United States Commissioner.

GOVERNMENT'S EXHIBIT 16.

Statement of Fred Cook, Jr., Made in the Office of the Bureau of Narcotics on February 24th 1958 Statement Typed by Narcotic Agent M. P. Richards—Witnessed by Agent Gilkey and Sgt. Algy F. Landry.

Q. Fred Cook, as you know we are Narcotic Officers and we wish you to tell us about your activity and knowledge of the narcotic traffic, particularly relative Ruth Williams. But, first, we wish to advise you of your Constitutional rights in that you are entitled to a lawyer and that you do not have to answer all questions and anything you do say can and will be used against you in the event of prosecution. Do you understand this?

A. Yes, I understand.

Q. What relation is Ruth Williams to you?

A. She is my aunt.

Q. How long have you known her?

A. All my life.

Q. Did you know that she was dealing in narcotic drugs?

A. Not until today.

Q. Have you ever delivered any package to anyone for Ruth Williams?

A. Yes; the other day—about Saturday I think she gave me a package to deliver to a woman named Jewel who lives at 4015 Kansas Street. Mrs. Williams told me to take this package and give it to Jewel and Jewel would give me $100.00.

Q. Did you take the package to Jewel and did you receive any money?

A. Yes, Jewel gave me $100.00 and I took it back and gave it to Mrs. Williams.

Q. Tell me in your own words what you did today after you first arrived at Mrs. Williams' residence.

A. About 8:30 AM I got to her house. I washed some dishes and I dumped the trash. I went to the bank on 48th & Vermont and deposited a check for Mrs. Williams. I returned to her house and I was there for a short while after which she told me that she had a package for me to deliver. I asked her where and she replied the same place I went the other day, over on Kansas. She also told me to pick up some money from the woman at that address; also that I should take a couple dresses and blouses

and bring them back; that everything would be allright. She then gave me three rubber condoms and I left the house, entered my car and went to Kansas, number 4015. I knocked on the door and this woman Jewel opened the door and I entered. I gave Jewel the three rubber condoms and Jewel told me that all of it was not there. I told her I did not know anything about it; that she should call Ruth. She made a call and then she told me that everything was allright and for me to come back as soon as I can. Jewel then gave me a large stack of bills and told me to give it to Ruth. I left the house and returned to Ruth's house. I gave Ruth the stack of money and she gave me three more rubber condoms; and told me to take it back to Jewel; that she had made a mistake. I again took the three condoms which held some white powder back to Jewel and gave them to Jewel. I returned to Ruth's house. At that time Ruth told me she was going to pay me $10.00 to pay on my doctor's bill. She never did. I was later arrested by the officers.

I have read the foregoing statement and it is the truth to the best of my knowledge and belief. I have not been made any promises or have any threats been made to me for giving this statement.

A. F. Landry

M. P. Richards

Fred Cook Jr.

Wm. C. Gilkey